ALTS
Association for Local Telecommunications Services

DIRECT DIAL: (202) 969-2585

EMILY M. WILLIAMS
ATTORNEY

April 21, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Secretary Salas,

On April 13, 1998, the Association for Local Telecommunications Services ("ALTS") filed Comments in a proceeding entitled "Petition of the Alliance for Public Technology Requesting Issuance of Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act." The Public Notice requesting comments had referenced "CCB/CPD 98-15" which is what the ALTS comments referenced. By public notice dated April 14, 1998 (DA 98-720) the Commission clarified that all comments and replies should reference "RM No. 9244" rather than the CCB/CPD number.

ALTS is hereby resubmitting its comments with new cover pages to indicate the correct "RM No. 9244." That is the only change that has been made to the comments.

Thank you for your time and consideration. Should you have any questions about the above, please call me at 202 969 2585. Thank you.

Sincerely,

Emily M. Williams

Emily M. Williams

Before the
Federal Communications Commission
Washington, D.C. 20554

Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	))))))	RM No. 9244

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006
(202)969-2583

April 13, 1998

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	))))))	RM No. 9244

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Pursuant to the Public Notice released March 12, 1998 (DA 98-496), the Association for Local Telecommunications Services ("ALTS") hereby submits these comments on the Petition filed by the Alliance for Public Technology ("APT") on February 18, 1998, which ask the Commission to commence a proceeding to adopt policies to remove barriers to the deployment of advanced telecommunications facilities and services.

I. INTRODUCTION AND SUMMARY

ALTS is a national trade association representing facilities-based competitive local exchange carriers. As such, it supports all reasonable and competitively neutral actions to implement section 706. ALTS does not object to some of the proposals put forth by APT, takes no position on others, and is unable to comment on yet others because the proposals are not sufficiently definite to permit the members of ALTS to form an

opinion at this time.[1]

In particular, ALTS does not object to the commencement of a section 706 rulemaking before the time called for in the Telecommunications Act of 1996, nor does it object to allowing pricing freedom for incumbent LECs concerning advanced data services, provided there are protections to prevent any geographic targeting of non-dominant CLEC competitors.[2] What ALTS does object to are those portions of APT's request that are not competitively neutral, and which could result in monopoly provisioning of high speed data services, an outcome that is prohibited by section 706 and the fundamental pro-competitive philosophy of the 1996 Act.

---

[1] For example, ALTS takes no position on APT's suggestion the Commission initiate a negotiated rulemaking to address the introduction of access charge on ISPs. The Commission has already obtained comment on these issues in Usage of the Public Switched Network by Information Service and Internet Access Providers (CC Docket No. 96-263, released December 24, 1996; "Internet NOI").

[2] Some of APT's proposals do not require extended comment. For example, although APT has a heading entitled "Set an appropriate sunset for the 251(c) regime", it does not request a definite date for termination of any of the section 251(c) requirements. Indeed, APT admits such an action would be illegal (Petition at 21: " ... the Commission has the authority to forbear enforcing sections 251(c) and 271 only after their full implementation ...;" emphasis supplied). Rather, APT is actually seeking a simple commitment from the Commission that it will regularly reevaluate the need for the section 251(c) regulatory scheme. ALTS sees no need for the Commission to make such a commitment, based on the Commission's frequent reiteration of its position that it will constantly reevaluate the need for various regulatory policies.

II. APT'S PETITION PRESENTS SOME ISSUES THAT DIFFER FROM THE RBOC SECTION 706 PETITIONS.

APT's petition asks the Commission to commence a rulemaking pursuant to section 706 of the Telecommunications Act of 1996. Its petition is divided into two sections: the first lists deregulatory actions APT asserts will promote the goals of section 706 (APT Petition at 15-27). The second lists certain affirmative actions APT urges the Commission to adopt to promote infrastructure investment for advanced capabilities (APT Petition at 28-40). These requests make APT'S petition both broader and narrower than the section 706 petitions recently filed by three Regional Bell Operating Companies,[3] which request relief for the individual companies from section 271 and 251(c) requirements. ALTS strongly opposes the three RBOC section 706 petitions.

The deregulatory actions requested by APT include: (1) applying the section 251(c) regulatory regime only to the existing ILEC networks, and not to new advanced capabilities like ADSL or HFC; (2) phasing out the UNE/TELRIC scheme over time, especially as to switches; (3) "deal[ing]" with the embedded (stranded) cost problem in an open and accountable manner; and,

---

[3] See In re Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Dkt No. 98-11; Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Dkt No. 98-26; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability, CC Dkt No. 98-36.

(4) instituting pricing reform and retail price deregulation in specified circumstances.[4]

APT argues generally that the Commission has been remiss in carrying out the mandate of section 706 of the Telecommunications Act to encourage the deployment of advanced telecommunications capability to all Americans. Specifically, APT argues that the Commission's sole reliance on competition to provide sufficient deployment of advanced communications services and facilities is mistaken policy because facilities-based competition in the local market will come much more slowly than anyone anticipated in 1996.

As ALTS stated in its opposition to the RBOCs' section 706 petitions, ALTS does not necessarily oppose the streamlining of depreciation schedules[5], accounting requirements, or altering end user rate regulation as they currently apply to advanced data services -- though none of the section 706 petitions provides sufficient detail to permit a reasoned assessment of such initiatives. On the other hand, ALTS objects emphatically to any

---

[4] The affirmative actions requested by APT include: (1) an adjustment to the ILEC price cap productivity index; (2) the imposition of "appropriate" conditions to promote the objectives of section 706 whenever the Commission approves a merger; and (3) the establishment of a "federal/state policy framework for developing and supporting community/provider partnerships designed to aggregate effective demand for community-based applications." ALTS takes no position currently on these suggestions.

[5] See APT Petition at 22.

actions that are not competitively neutral and, in particular, to the reintroduction of monopoly provisioning for advanced data services via Commission forbearance from enforcement of section 251(c).

III. THE COMMISSION CAN NOT LEGALLY LIMIT ITS SECTION 251(c) REGIME TO THE EXISTING ILEC NETWORK AS REQUESTED BY APT.

APT argues that the Commission should make the section 251(c) unbundling requirements "applicable only to the existing network (e.g., as of August 8, 1996) and not to future advanced capabilities" (APT Petition at 15). Yet APT recognizes in another part of its petition that section 10 of the Act prohibits the Commission from forbearing from enforcing the provisions of section 251(c) until that section has been fully implemented.[6] APT argues, nonetheless, that reading section 706 and 251(c) in

---

[6] APT Petition at 21: (" ... the Commission has the authority to forbear enforcing sections 251(c) and 271 only after their full implementation ...").

APT's assumption elsewhere that section 251(c) can be negated simply by invoking section 706 (which appears inconsistent with its statement at p. 21), is clearly wrong given that section 10 of the Act expressly limits the Commission's forbearance authority to prohibit the Commission from forbearing to enforce sections 251(c):

> " ... the Commission may not forbear from applying the requirements of section 251(c) . . . under subsection (a) of this section [creating the Commission's "Regulatory Flexibility" power] until it determines that those requirements have been fully implemented."

This explicit limitation of "forbearance" in the statutory provision creating the Commission's general forbearance authority clearly controls the same term when it is used in a more specific instance, as it is in section 706.

pari materia compels the Commission to implement 251(c) only as to the existing ILEC network. APT argues that any other reading of the Act would negate section 706 and its vital purpose. In addition, APT states that "CLECs' need for access to ILEC facilities has never been shown to be based on access to future advanced telecommunications capabilities such as HFC or ADSL but rather to the existing network." (APT Petition at 15.)

APT is dead wrong about the facts, about sections 251(c) and 706, and about sound policy. First, the Commission's Local Competition Order (CC Docket No. 96-98; released August 8, 1996) unmistakably concludes that CLECs need robust access to precisely these elements (id. at ¶ 380):

> "We further conclude that the local loop element should be defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises. This definition includes, for example, two-wire and four-wire analog voice-grade loops, and two wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS 1-level signals." (Emphasis supplied.)[7]

Although numerous CLECs have sought to exercise their rights to obtain advanced data loops under this portion of the Commission's Local Competition Order (a portion that was upheld

---

[7] In addition, Section 51.319(c) -- The Local Switching Capability -- specifically includes the "line-side facilities [including] the switch line card." It is the switch line card that enables carriers to provide the newer high speed services over older loops.

by the Eighth Circuit), they have been stonewalled by the ILECs at the state level. Only recently, for example, did the New York PSC upheld the rights of CLECs to extended data loops.

Second, there is absolutely nothing in section 251(c) itself that limits it to the existing ILEC network, either as of the time of the passage of the Act, or at the adoption of the Local Competition Order. The Commission would be reading a major limitation into the Act based solely on the general admonishment in section 706 to encourage the development and deployment of advanced telecommunications services to the nation.

Third, APT has failed to show that its proposed reading of section 251(c) would be consistent with the requirements of section 706:

> "The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, and in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." (Emphasis supplied.)

While section 706 allows the Commission and state PSCs to forbear from regulating certain services or facilities investment when forbearance will encourage deployment on a reasonable and

timely basis, there remain three very important caveats in section 706: (1) protection of the public interest, convenience and necessity; (2) protection of competition in local markets; and (3) actual removal of barriers to infrastructure investment. As shown in these comments, there are several reasons why the removal of section 251(c) requirements with respect to new data facilities and capabilities would not be consistent with the public interest, promotion of local competition, or removal of actual barriers to infrastructure development.

Fourth, APT is completely mistaken in suggesting that provisioning advanced data services without competition constitutes good policy. Chairman Kennard recently emphasized the link -- and not the discontinuity -- that exists between competition and digital technology in his testimony to the Senate on March 19, 1998:

> " ... I think I speak for all of us at the FCC in saying that we feel privileged to be working at the Commission at this important time in the history of communications law and policy. When the history of communications policy in this decade is written, I believe it will largely be about two transforming events: the move to embrace competition as an organizing principle in the law and the conversion from analog to digital technology .... First and foremost, there is competition. Competition has been a goal of communication policy makers for many years. With the 1996 Act, it has become our national policy and the organizing force of much of our work. The 1996 Act gives us the tools to accelerate the pace of competition and, with your support and sufficient resources, I am confident we will." (Emphasis supplied.)

Elimination of the 251(c) unbundling requirement would

likely result in the monopoly provisioning of these advanced services. Simple common sense suggests the adoption of monopoly provisioning for any portion of advanced data services would not encourage greater development. The Bell System took years just to decide to offer telephones in a few simple colors. Innovation would suffer irreparably if the ILECs gained a market stranglehold on advanced data services.

APT argues that the Commission should limit implementation of section 251(c) to the existing network because without such a limitation, the ILECs will assertedly have no incentive to develop advanced capabilities like DSL or HFC. This is just an reassertion of APT's request that UNE prices be based on: "a fully distributed cost model that would encourage facilities based competition;" APT Reply Comments in CC Docket No. 96-98 at 3. But the claim that incumbents will not make adequate investments -- whether in mature or cutting edge technologies -- was raised by numerous parties in the Local Competition proceeding[8] and was expressly rejected by the Commission.[9]

---

[8] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶ 638: " .... incumbent LECs argue that setting prices based on the forward-looking economic cost of the element ... will discourage efficient entry and useful investment by both incumbent local exchange carrier and their competitors."

[9] Id. at ¶ 697: " ... the cost-based pricing methodology that we are adopting is designed to permit incumbent LECs to recover their economic costs of providing interconnection and unbundled element, which may minimize the economic impact of our

(continued...)

Indeed, the Commission expressly acknowledged the authority of the states to calculate UNE prices using a risk-adjusted cost of capital reflecting particular business risks (id. at ¶ 702):

> "We recognize that incumbent LECs are likely to face increased risks given the overall increases in competition in this industry, which generally might warrant an increased cost of capital, but note that, earlier this year, we instituted a preliminary inquiry as to whether the currently authorized federal 11.25 percent rate of return is too high given the current marketplace cost of equity and debt .... States may adjust the cost of capital if a party demonstrates to a state commission that either a higher or lower level of cost of capital is warranted .... We note that the risk-adjusted cost of capital need not be uniform for all elements."

In short, if ILECs really need a higher return in order to recover their opportunity costs, and thereby have an economic incentive to make investments in the particular UNEs that CLECs use to provision advanced data services (or any other kind of services), they are free to seek those higher returns from the states.

APT also makes the factual misassumption that an ILEC data subsidiary would lack "market power" (APT Petition at 17). This was not the Commission's conclusion concerning the ILECs' potential affiliates in its Non-Accounting Safeguards Order (CC

---

[9](...continued)
decisions on incumbent LECs ...."

Docket No. 96-149, released December 24, 1996),[10] nor does it reflect the reality that the ILECs currently have almost all of the existing local customer base. This plainly constitutes a source of market power, whether exercised directly by an incumbent, or through its affiliate.

Furthermore, permitting ILECs to place "advanced technology" in a separate subsidiary could never be effectively policed. What is the difference between new technology and old technology? Could fiber be treated as old, while its electronics were treated as new? The inherent ambiguity would create immense loopholes permitting the ILECs to move core elements of the Public Switched Network into the subsidiaries envisioned by APT, and thereby escape any meaningful obligation to provision bottleneck facilities to their competitors.

IV. PHASEOUT OF THE UNE/TELRIC REGIME OVER A PERIOD OF TIME

APT proposes that the Commission stimulate both CLEC and ILEC development in infrastructure by adopting a rule that after a specified period of time, there would be a gradual phase-out of the UNE/TELRIC scheme. APT states it is limiting this request to switches (and not local loops) because it is much more difficult for CLECs to duplicate the loop than it is to duplicate the

---

[10] " ... BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3);" ¶ 10.

switch.[11]

ALTS agrees with APT that the most difficult and expensive part of the network to duplicate is the loop, therefore forcing CLECs to continue obtaining loops from ILECs for the foreseeable future. On the other hand, many members of ALTS are placing their own switches in their service areas.

Thus, APT's general position -- that the Commission should distinguish between bottleneck facilities and more competitive elements, such as switching, in the application of TELRIC pricing -- does indeed deserve comment and consideration. As ALTS has pointed out in challenging the Commission's pricing of shared transport and its companion functionality, unbundled switching, the Commission must consider the impact of its pricing and other decisions on the incentives of investment in alternative facilities.[12] As APT correctly observes, permitting a new entrant that has made no investment in such facilities to obtain a price that is better than the unit costs of new entrants making

---

[11] As an alternative, however, APT states that the Commission could consider simply raising the price of all the elements after a specified period until they reach a level allowing ILEC recovery of historic costs. That proposal is at odds with its primary proposal, as it does not even recognize the bottleneck nature of local loops. In any event, the Commission and virtually every state Commission has determined that the TELRIC pricing methodology properly compensates the ILECs for use of UNEs.

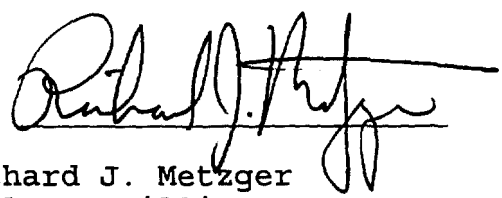
[12] Brief of Intervenor ALTS in Southwestern Bell Telephone Co. v. FCC, No. 97-3389 (8th Cir. filed No. 21, 1997).

investments would be fundamentally inconsistent with the 1996 Act's goal of: "a national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and service to all Americans ...."[13]

CONCLUSION

For the foregoing reasons, ALTS asks that the Commission reject the portions of APT's petition that would relieve RBOCs of their pro-competitive obligations in relation to advanced data services, while granting APT's request for a Commission inquiry concerning the proper pricing of those UNEs that are subject to competition.

Respectfully submitted,

By: 

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006
(202)969-2583

April 13, 1998

---

[13] Joint Explanatory Statement of the Conference Committee, House Rep. No. 104-204, 104TH CONG., 2D SESS. at 1 (1996).

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 1998, copies of the foregoing Comments of the Association for Local Telecommunications Services were served via first class mail, postage prepaid, or by hand as indicated to the parties listed below.

Emily M. Williams

Emily M. Williams

Magalie Roman Salas*
Secretary
Federal Communications Comm'n
1919 M Street, N.W.
Washington, D.C. 200554

Richard Metzger*
Chief, Common Carrier Bureau
Federal Communications Comm'n
1919 M Street, N.W.
Washington, D.C. 20554

Linda Kinney*
Plans and Policy
Federal Communications Comm'n
1919 M Street, N.W.
Washington, D.C. 20554

Janice Myles*
Rm 544
Federal Communications Comm'n
1919 M Street, N.W.
Washington, D.C. 20554

Maureen Lewis
Barbara O'Connor
Donald Vial
Alliance for Public Techology
901 15th St., NW, Suite 230
Washington, D.C. 200387-7146

John Thorne
Robert Griffen
Bell Atlantic, 8th Floor
1320 North Court House Road
Arlington, Virginia 22201

Richard Taranto
Farr & Taranto
2445 M Street, N.W., Suite 225
Washington, D.C. 20037

John T. Lenahan
Christopher Heimann
Frank Michael Panek
Room 4H84
2000 W. Ameritech Center Dr.
Hoffman Estates, Illinois
60196-1025

William T. Lake
John H. Harwood II
Johnathan J. Frankel
Wilmer, Cutler & Pickering
2445 M Street, N. W.
Washington, D.C. 20036

Robert B. McKenna
Jeffry Brueggeman
U S West, Inc.
1020 19th Street, NW
Washington, D.C. 20036

ITS*
1231 20th Street, NW.
Washington, D.C. 20036

* by hand